NO. 19-36054

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUANAH M. SPENCER

Appellant,

v.

CITY OF SPOKANE, a municipal corporation in and for the State of Washington; GREGORY PAUL LEBSOCK, in his individual and official capacities; SPOKANE COUNTY, a municipal corporation and political subdivision of the State of Washington; and Casey A. EVANS, in his individual and official capacities,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
No. 2:19-cv-00100
The Honorable Rosa Malouf Peterson

APPELLEES CITY OF SPOKANE AND GREGORY PAUL LEBSOCK'S ANSWERING BRIEF

Michael E. McFarland, Jr., WSBA #23000
Thomas B. Rohrer, WSBA #552570
Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201
Telephone: (509) 455-5200
Attorneys for Appellees

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

I. SUMMARY ARGUMENT

Appellant Quanah Spencer and his wife Gwen Spencer filed a lawsuit in Spokane County Superior Court against SAS Oregon alleging consumer protection violations arising out of the purchase of property. Former Spokane Police Department officers were subsequently added as individual defendants. The Spencers were represented by Spokane area attorney Aaron Kandratowicz. The Spencers eventually lost on summary judgment and Spokane County Superior Court Judge Maryann Moreno ordered garnishment of the Spencers' wages to pay the defendants' attorney fees. After the order was entered, Mr. Kandratowicz informed the Spencers that Judge Moreno awarded them a permanent injunction ("purported order") against the garnishment order. This turned out to be untrue, as no such order was ever presented to or entered by the court. Instead, Mr. Kandratowicz forged Judge Moreno's signature on the purported order. SER 56-60. Mr. Spencer eventually faxed a copy of the purported order to his employer using his credit card at a Spokane UPS store. After being informed of the purported order by the attorney for SAS Oregon, Judge Moreno filed a complaint with the Spokane Police Department ("SPD") for forgery.

Appellee Gregory Paul Lebsock, a detective with the Spokane Police Department, was assigned the investigation. Det. Lebsock eventually submitted an Affidavit of Facts in support of probable cause to arrest Mr. Spencer. Spokane

County Superior Court Judge Harold Clarke determined there was probable cause and a warrant was issued. Mr. Spencer was eventually arrested at his home in Missoula, Montana on January 11, 2018. He stayed in the Missoula County jail until January 16, 2018. On that date, Det. Lebsock was contacted by Mrs. Spencer and Missoula area attorney Milt Datsopoulous, who was assisting the Spencers at that time. Mrs. Spencer and Mr. Datsopoulous submitted correspondence and other documents to Det. Lebsock that showed that Mr. Kandratowicz was likely responsible for the forgery and that he had deceived the Spencers. Mr. Spencer was released from jail and the charges were eventually dismissed. Det. Lebsock then obtained warrants for Mr. Kandratowicz, which eventually led to Mr. Kandratowicz pleading guilty to forgery.

Mr. Spencer filed a complaint in federal court within the Eastern District of Washington. He alleged that the defendants engaged in racially discriminatory conduct towards him due to his status as a Native American. He also alleged that Det. Lebsock acted in a biased manner due to Det. Lebsock's relationship with the former Spokane Police Department officers who were individual defendants in the Spencers' consumer protection lawsuit. Mr. Spencer's claims in this matter include violations of the Fourth and Fourteenth Amendment, along with a collection of state law claims. All Defendants/Appellees eventually moved for summary judgment. Mr. Spencer argued that further discovery was needed as it relates to Det. Lebsock's state

of mind and other aspects of the investigation. Mr. Spencer's claims were dismissed on summary judgment.

The trial court correctly concluded that Mr. Spencer's arrest was based upon the existence of probable cause. Absent evidence of judicial deception, this determination of probable cause was and is fatal to all of Mr. Spencer's claims against the City and Det. Lebsock. The trial court correctly found that there was no such evidence.

Mr. Spencer now argues that the trial court erred in determining that further discovery was unnecessary, as he needed discovery into Det. Lebsock's intent and motive. As the City and Mr. Lebsock successfully argued to the trial court, whether Det. Lebsock acted with a discriminatory intent is irrelevant, as the arrest warrant for Mr. Spencer was based on a judicial finding of probable cause. Mr. Spencer's arguments to the contrary are not persuasive, as case law is clear in the 9th Circuit that subjective intent has no place in analyzing Fourth amendment issues when there exists probable cause. Further, even if such intent was a determining factor, Mr. Spencer has provided no evidence of a discriminatory intent from Det. Lebsock, the SPD or the City of Spokane.

II. STATEMENT OF FACTS

Quanah Spencer, a licensed attorney in the state of Washington, and his wife Gwen Spencer filed a consumer protection lawsuit against SAS Oregon, LLC and

other named defendants in 2017. (ER 3). The Spencers were represented by Spokane attorney Aaron Kandratowicz. *Id.* Other named defendants included Joseph and Marie Pence and Pence Properties. (ER 113). Mr. and Mrs. Pence are former Spokane Police Department officers who worked with Det. Lebsock. (ER 192-93). Det. Lebsock maintained a professional relationship with the Pences that never evolved into a social friendship. *Id.* At some point, Det. Lebsock adopted a puppy from the Pences. *Id.* SAS Oregon was represented by attorney Whitney Norton of Piskel Yahne Kovarik, PLLC. a law firm in Spokane. (ER 155).

The Spencers' claims against SAS Oregon were dismissed by Spokane Superior Court Judge Maryann Moreno on summary judgment. (ER 3). Judge Moreno awarded SAS Oregon it attorney's fees and issued a writ of garnishment against the Spencers' employers and their bank. *Id.* Following the writ of garnishment, Mr. Kandratowicz told the Spencers that he had obtained a permanent order for an injunction signed by Judge Moreno protecting the Spencers' bank accounts from garnishment. *Id.* It is now known that the purported order was forged by Mr. Kandratowicz. After receipt of the purported order form Mr. Kandratowicz, Mr. Spencer faxed a copy of it to his employer, Burlington Northern Santa Fe (BNSF). *Id.* Ms. Norton and Judge Moreno eventually discovered and realized that the purported order that Mr. Spencer had faxed was fraudulent and included a forgery of Judge Moreno's signature. (ER 234-235).

On October 23, 2017, the Spencers filed a joint report with the SPD, in which they claimed they were the victims of an identity theft. (ER 205-08). The complaint related to an alleged fraudulent phone call to the Spencers' financial institution, Spokane Teachers Credit Union ("STCU"). *Id.* The complaint was accompanied by an 11 page declaration drafted by Mr. Spencer. (ER 209-19). The SPD report regarding the Spencers' Complaint notes that the caller was able to procure $549.83 from the Spencers' bank account, and they were charged an additional $150.00 in garnishment fees. (ER 205-06; SER 5-6, 61-64).

On November 30, 2017, Judge Moreno contacted the SPD about the purported order. (ER 203-04, 233). Det. Lebsock was assigned to the matter and initially focused his investigation on Mr. Spencer. (SER 4-5, 12-13, 48-55). He still considered Mr. Kandratowicz a suspect at this time. (SER 12-13). Through his investigation, Det. Lebsock established a sufficient basis to submit an affidavit in support of an arrest warrant for Mr. Spencer. (ER 233-40, 250-53; SER 9-11, 91-101). On January 5, 2018, Spokane County Superior Court Judge Harold Clarke determined Det. Lebsock had established enough probable cause, and signed off on the warrant. (ER 252). Det. Lebsock's investigation to that point had determined that Mr. Spencer had faxed a forged document (the purported order), which he paid to do with his own credit card, and that by submitting the forged document to his employer, the Spencers were receiving a financial benefit. (ER 233-40, 250-53).

On January 11, 2018, Mr. Spencer was arrested at his home in Missoula, Montana. (ER 5). He was booked into the Missoula County Jail, where he remained through January 16, 2018. (ER 5). At approximately 9:30 a.m. on January 16, 2018, Det. Lebsock spoke with Mrs. Spencer and Mr. Datsopoulous. (ER 186-89). Det. Lebsock reviewed material forwarded to him by Mrs. Spencer and Mr. Datsopoulous, including correspondence between the Spencers and Mr. Kandratowicz, as well as other related documents. *Id.* Based on his review of this material, Det. Lebsock determined there may be evidence that Mr. Kandratowicz engaged in fraudulent conduct during his representation of the Spencers. *Id.* Det. Lebsock found the information credible and, by 1:15 p.m. PST, had spoken with the Spokane County Prosecutors Office and had the warrant recalled. As a result, Mr. Spencer was released from the Missoula County Jail. *Id.* The charges against Mr. Spencer were dismissed and were never refiled. (ER 202, 269; SER 44).

After Mr. Spencer's arrest and release, Det. Lebsock turned his attention to Mr. Kandratowicz. (ER 189-192). After two days of attempting to meet and speak with Mr. Kandratowicz, Det. Lebsock and the SPD executed a warrant to search Mr. Kandratowicz's home, office, car and person. (ER 191-92). Mr. Kandratowicz later pled guilty to two counts of forgery and one count of second degree identity theft. (ER 6).

At the time of Mr. Spencer's arrest, Det. Lebsock was unaware of Mr. Spencer's status as a Native American. (ER 187). He only became aware of the same after reviewing a memorandum produced by the Spencers' current counsel of record. *Id.*

In his lawsuit, Mr. Spencer argued that Det. Lebsock's investigation was motivated by a discriminatory intent due to the Spencers' status as Native Americans, and their adverse legal involvement with former SPD officers. (ER 271). The Complaint included allegations of violations of Mr. Spencer's constitutional rights under the Fourth and Fourteenth Amendments, along with of the following state law claims: abuse of process, conspiracy, intentional infliction of emotional distress, negligent infliction of emotional distress, false imprisonment, negligent investigation and malicious prosecution. (ER 256-87). In an effort to avoid the dispositive fact that his arrest was based upon a judicial finding of probable cause, Mr. Spencer alleged that an affidavit of facts submitted by Det. Lebsock in support of the arrest warrant was judicially deceptive in that it contained false statements and omitted information that affected the issuance of the warrant in a material manner.

On August 1, 2019, Mr. Spencer served his First Set of Interrogatories and Requests for Product to the City of Spokane and Det. Lebsock. (ER 145-46). There were 51 requests for production and 25 interrogatories. On September 19, 2019, City and Det. Lebsock served their responses to the discovery requests. (ER 34-35).

Supplemental documents were served on September 27, 2019. Along with their responses to the discovery requests, the City and Det. Lebsock provided a privilege log for withheld and/or redacted documents, which included a description of the privileges and/or the reason the documents were withheld.

The City and Det. Lebsock moved for summary judgment on August 12, 2019. (ER 176). The City and Det. Lebsock successfully argued that Mr. Spencer's arrest was based upon probable cause and that there was no evidence of judicial deception. (ER 1-38). Judge Rosanna Malouf Peterson found persuasive the City's and Det. Lebsock's arguments that Det. Lebsock's investigation materials displayed a clear and well thought out investigation based on logic, experience and the facts surrounding the alleged forgery. *Id.* That is, Judge Peterson found that Det. Lebsock's investigation, and the subsequent arrest of Mr. Spencer, were based on probable cause and that there was an absence of evidence of judicial deception. *Id.* Judge Peterson therefore concluded that Det. Lebsock was entitled to qualified immunity from Mr. Spencer's § 1983 claim. *Id.* Judge Peterson articulated her decision as follows:

> "Apart from making conclusory statements, Mr. Spencer has not explained why the alleged false statements and omissions are material. Even when the Court removes any allegedly false information and supplements the missing information about Mr. Kandratowicz's failure to appear, the remaining undisputed facts that support probably cause include: Mr. Spencer's wages were garnished in a state action; at some point he possessed a forged court order enjoining the garnishment of his wages; and he faxed that forged order to his employer to halt the wage garnishment, using a method of payment

> belonging to him. These actions, which Mr. Spencer does not contest, would lead an officer to reasonably believe that Mr. Spencer committed forgery by possessing, offering or "put[ting] off as true a written instrument which…kn[ew] to be forged. *See* Wash. Rev. Code § 9A.60.020.

(ER 14-15).

The foregoing summary by Judge Peterson articulates what the facts of this matter show: Det. Lebsock established probable cause for Mr. Spencer's arrest warrant. Judge Peterson's decision was the second time a judge found the existence of probable cause. Based upon the finding of probable cause, and based upon the lack of evidence of judicial deception, Mr. Spencer cannot establish that he has been deprived of his Fourth Amendment rights. Similarly, as a result of the prosecution and conviction of Mr. Kandratowicz, Mr. Spencer is unable to establish his Fourteenth Amendment selective prosecution claim. As a result of being unable to establish the violation of any constitutional rights, Mr. Spencer cannot establish liability of the City pursuant to *Monel v. Department of Social Servs.*, 436 U.S. 658 (1978). Accordingly, the Court should affirm the trial court's dismissal of all claims against the City and Det. Lebsock.

III. ARGUMENT

A. Detective Lebsock is Entitled To Qualified Immunity Based On The Existence Of Probable Cause.

When an arrest is based on a warrant that contains probable cause, law enforcement officers are entitled to qualified immunity. Officers lose qualified

immunity "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Johnson v. Walton*, 558 F.3d 1106, 1111 (9th Cir. 2009) (*quoting Malley v. Briggs*, 475 U.S. 335, 344–45 (1986)). Judge Clarke's approval for Mr. Spencer's arrest warrant creates a presumption of probable cause and Mr. Spencer is unable to rebut that presumption.

Applied to constitutional claims, and claims for false arrest, imprisonment or malicious prosecution, probable cause is a complete defense. "The absence of probable cause is a necessary element of § 1983 false arrest and malicious prosecution claims." *Yousefian v. City of Glendale*, 779 F.3d 1010, 1014 (9th Cir. 2015). "[P]robable cause is a complete defense to an action for false arrest and imprisonment." *Orin v. Barclay*, 272 F.3d 1207, 1218 (9th Cir. 2001) (quoting *Hanson v. City of Snohomish*, 121 Wash.2d 552, 852 P.2d 295, 301 (1993)).When an officer makes an arrest pursuant to a warrant based upon probable cause, they will be considered immune from suit even if the detained individual is found to be innocent. *Henry v. United States*, 361 U.S. 98, 102 (1959) (citing to *Carroll v. United States*, 267 U.S. 132, 156 (1925)).

A valid warrant requires four elements: (1) be based on probable cause; (2) be supported by a sworn affidavit; (3) describe particularly the place of the search; and (4) describe particularly the things to be seized. *Sinclair v. City of Grandview*, 973 F. Supp. 2d 1234, 1249 (E.D. Wash. 2013). Probable cause is determined by making

"a practical, common-sense decision whether, given all the circumstances set forth in the [warrant] affidavit… there is a possibility that… evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "Probable cause exists 'when police officers have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed…a crime." *United States v. Wallace*, 213 F.3d 1216, 1220 (9th Cir. 2000) (quoting *United States v. Fouche*, 776 F.2d 1398, 1403 (9th Cir. 1985)). In determining whether probable cause exists, courts look to the totality of the circumstances. *United States v. Scott*, 705 F.3d 410, 417 (9th Cir. 2012).

Probable cause for the investigation into Mr. Spencer and his subsequent arrest was established. As outlined in his accompanying affidavit of facts used in support of Mr. Spencer's arrest warrant, Det. Lebsock identified the purported order, how it was transmitted and that Mr. Spencer was the one who faxed it to his employer. The trial court correctly found that this investigatory process supported a finding of probable cause. ER 12-15, 31, 36. As probable cause existed and Mr. Spencer possesses no viable claim for judicial deception (see below), Det. Lebsock is entitled to qualified immunity.

When he first began investigating Judge Moreno's complaint of forgery, Det. Lebsock reviewed the purported order. ER 233-40. His affidavit of facts submitted in support of the arrest warrant detailed that: (1) the Spencers had filed a false police

report in relation to the matter to which the purported order applied; and (2) Mr. Spencer had faxed the purported order himself. ER 239-240.

Det. Lebsock's investigatory materials are clearly based on information that would lead a reasonable person to believe that an offense had been committed by Mr. Spencer. There was more than a bare suspicion of criminal activity, and there was strong probability that Mr. Spencer committed the forgery. In developing the investigation, Det. Lebsock relied on evidence obtained from valid warrants and court records. His interpretation of this material was reasonable. Spokane County Superior Court Judge Harold Clarke found the existent of probable cause to arrest Mr. Spencer. Judge Peterson likewise correctly found the existence of probable cause.

B. The Judicial Finding Of Probable Cause Is A Complete Defense To All Of Mr. Spencer's Claims.

When probable cause exists for an arrest or seizure, a law enforcement officer is entitled to qualified immunity against all such claims raised by Mr. Spencer. *See Johnson v. Walton*, 558 F.3d at 1111. Applied to constitutional claims, and claims for false arrest, imprisonment or malicious prosecution, probable cause is a complete defense. *See Yousefian v. City of Glendale*, 779 F.3d at 1014; *Orin v. Barclay*, 272 F.3d at 1218. A judge's determination as to whether a warrant and its accompanying documents establish probable cause is given great deference. *United States. V. Leon*, 468 U.S. 897, 914 (1984).

When an officer makes an arrest pursuant to a warrant based upon probable cause, they will be considered immune from suit even if the detained individual is found to be innocent. *See Henry v. United States*, 361 U.S. 98 at 102. Accordingly, the fact Mr. Spencer was not convicted doesn't vitiate a finding of probable cause. "A valid arrest based on then-existing probable cause is not vitiated if the suspect is later found innocent." *Criss v. City of Kent*, 867 F.2d 259, 262 (6th Cir.1988); *Kelley v. Myler*, 149 F.3d 641, 647 (7th Cir.1998) ("[P]robable cause does not depend on the witness turning out to have been right; it's what the police know, not whether they know the truth, that matters").

C. Judge Harold Clarke Was Not Judicially Deceived.

Mr. Spencer argues that judicial deception affected the issuance of the January 5, 2018 arrest warrant. He claims that Det. Lebsock made false statements and omitted material information in the warrant that was determined by Judge Clarke to have probable cause. *Opening brief*, p. 7-8. As correctly determined by the trial court, the alleged and admitted errors made by Det. Lebsock were immaterial to the finding of probable cause. The trial court correctly found that if the errors were removed from the warrant, the investigation and arrest of Mr. Spencer were nonetheless supported by probable cause. (ER 12-15, 31, 36).

For Mr. Spencer to successfully argue an instance of judicial deception, he must establish that: "(1) the affidavit contains intentionally or recklessly false

statements, and (2) the affidavit purged of its falsities would not be sufficient to support a finding of probable cause." *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1123 (9th Cir. 1997) (quoting *United States v. Lefkowitz*, 618 F.2d 1313, 1317 (9th Cir.), *cert. denied*, 449 U.S 824, 101 S.Ct. 86, 66 L.Ed 2d 27 (1980)). When an officer includes false statements in a warrant, courts remove the falsities and determine if the remaining evidence justified the warrant. *Sinclair v. City of Grandview*, 973 F. Supp. 2d at 1250. If an officer omits facts required to prevent true statements from misleading the reader, courts must determine if the affidavit establishes probable cause when supplemented with the omitted material. *Id.* Omissions or misstatements stemming from negligence or good faith cannot invalidate an affidavit which established probable cause. *United States v. Smith*, 588 F.2d 737, 740 (9th Cir. 1978). When an affidavit is corrected by the Plaintiff, the warrant will constitute as valid if it was not "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs*, 475 U.S. at 345. A plaintiff is required to show "(1) a substantial showing of deliberate falsehood or reckless disregard for the truth, and (2) establish that but for the dishonesty, the challenged action would not have occurred." *Liston v. County of Riverside*, 120 F.3d 965, 972-975 (9th Cir. 1997) (quoting *Hervey v. Estes*, 65 F.3d 784, 788-89 (9th Cir. 1995). When examining an officer's conduct within the scope of qualified immunity, the 9th circuit will examine "(1) whether a reasonable officer

should have known that he acted in violation of a plaintiff's constitutional rights with (2) the substantive recklessness or dishonesty question." *Butler v. Elle,* 81 F.3d 1013, 1024 (9th Cir. 2002). If it is found that the officer at issue did not act in a dishonest or reckless manner, their conduct cannot be determined as unconstitutional. *Id.*

Mr. Spencer alleges that Det. Lebsock and City of Spokane Police had a collection of misrepresentations and omissions in Mr. Spencer's warrant and accompanying investigative materials. *Opening brief*, p. 24-25; *See also*, ECF No. 38 ¶¶ 1, 4, 5, 6, 7, 9, 15, 19, 22, 23, 24, 25, 26, 28, 30, 35, 37, and 38/ER 113-117, 120-130; ECF No. 36, pp. 3-4, 13-14/ER 136-137, 143-144. The trial court summarized Mr. Spencer's claims regarding misrepresentations and omissions as follows:

> "The first allegedly false statement involves the transmission of the forged order to Mr. Spencer's employer, BNSF. The parties agree that Mr. Spencer faxed this order to his employer. *See* ECF No. 1 at 9. However, in his Affidavit of Facts, Detective Lebsock states "it would be logical to conclude" that the issuing court or Mr. Kandratowicz would have faxed the order to Mr. Spencer's employer if the order had been valid. *Id.* at 12; ECF No. 22-2 at 4. Mr. Spencer argues that this reasoning is illogical and therefore constitutes a false statement. ECF No. 1 at 13.
>
> Next, Mr. Spencer argues that Officer Lebsock falsely stated that Mr. Kandratowicz "consistently represented" the Spencer's. *Id.* He contends that Officer Lebsock knew this statement was false because Mr. Kandratowicz had failed to appear for the show cause hearing regarding the forged order. Therefore, he was not "consistently" representing the Spencer's. *Id.* Similarly, Mr. Spencer argues that Detective Lebsock omitted material information about Mr. Kandratowicz in his Affidavit of Facts, namely Mr. Kandratowicz's failure to appear at the show cause hearing. Mr. Spencer also argues that Detective Lebsock should have indicated that Mr. Kandratowicz was a

> possible suspect for the forgery. *See Id.* at 13-15. Mr. Spencer maintains that, had the issuing judge been aware of this information, the judge would not have found probable cause to arrest him."

(ER 13-14).

In analyzing these alleged omissions and errors under the materiality prong of a judicial deception claim, the trial court stated that "[a]part from making conclusory statements, Mr. Spencer has not explained why the alleged false statements and omissions were material." (ER 14). The trial court went on to state that:

> "Even when the Court removes any allegedly false information and supplements the missing information about Mr. Kandratowicz's failure to appear, the remaining unpasted facts that support probable cause include: Mr. Spencer's Wages were garnished in a state action; at some point he possessed a forged court order enjoining the garnishment of his wages and he faxed that forged order to his employer to halt the wage garnishment, using a method of payment belonging to him."

(ER 14).

The trial court correctly concluded that additional discovery into Det. Lebsock's state of mind was not necessary in order to rule on the summary judgment motion. However, Mr. Spencer alleges that the trial court did not go far enough, claiming that the trial court "erred by failing to account for and consider the *totality of the circumstances,"* as required by *Chism v. Washington State*, 661 F.3d 380, 392 (9th Cir. 2011). In reality, *Chism* provides support as to why the admitted errors by Det. Lebsock are not material to the finding of probable cause. In *Chism*, the Washington State Police conducted an investigation into child pornography

downloads. *Id.* at 382-83. Through the investigation, the police obtained a search warrant to arrest the plaintiff for violating the state's child pornography laws. *Id.* at 383. Eventually, the search and arrest warrants were executed, and no incriminating evidence or materials were found. Charges were never filed against the plaintiff as a result of the investigation. *Id.*

The plaintiffs filed suit, alleging judicial deception. *Chism v. Washington State*, at 383. The trial court ruled in favor of the defendants, and the Ninth Circuit Court of Appeals eventually reversed. *Id.* This Court's decision to reverse was based on a collection of errors made by the investigating officers. *Id.* These errors included a false statement in an officer's accompanying affidavit that the plaintiff was using internet service at his resident or business office to download child pornography. *Id.* at 387. The Court found that this statement was inaccurate, as when the officer drafted the affidavit, they possessed no evidence that the plaintiff had accessed any child pornography images. *Id.* Further, the officers had not determined that the images were ever downloaded by anyone. *Id.* At the time the affidavit was drafted, the only evidence linking the plaintiff to the website was the fact that the credit card he had was used to pay hosting fees for the sites. *Id.*

The second error was the assertion in the affidavit that the plaintiff's credit card used was used to purchase child pornography from the website. *Chism* at 387. This was incorrect, as the card was used to pay hosting fees for the sites to which the

illegal images were uploaded. *Id.* The affidavit also omitted that the IP addresses used to open the offending web accounts and websites were traced to individuals other than the plaintiff. *Id.* The affidavit also omitted that another IP address was used to log into the offending account was never traced. *Id*.

Equating the errors and omissions analyzed by this Court in *Chism* compared to the alleged errors and omission made by Det. Lebsock is disingenuous. The trial court in this matter had full access to the investigatory materials related to the warrant in question. As Mr. Spencer correctly points out in his opening brief, the trial court identified three undisputed facts that supported probable cause:

> Mr. Spencer's Wages were garnished in a state action; at some point he possessed a forged court order enjoining the garnishment of his wages and he faxed that forged order to his employer to halt the wage garnishment, using a method of payment belonging to him.

ER 14.

The trial court went on to state that "These actions, which Mr. Spencer does not contest, would lead an officer to reasonably believe that Mr. Spencer committed forgery by possessing, offering or "put[ting] off as true a written instrument which he…kn[ew] to be forged." ER 14-15. (Quoting Wash. Rev. Code § 9A.60.020 (Charge of forgery)).

In *Cameron v. Craig*, 713 F.3d 1012 (9th Cir. 2013), the plaintiff alleged constitutional violations following her arrest. The plaintiff was previously romantically involved and lived with an officer from the police department that

eventually arrested her. *Cameron,* 713 F.3d at 1015. After the relationship concluded, the plaintiff made purchases using the officer's credit card. *Id.* The officer saw the unauthorized purchased items at the plaintiff's residence during a social visit. *Id.* at 1015-16. The officer believed the plaintiff used his credit card to make the purchases and contacted the police. *Id.* at 1016. The detective assigned to investigate was a longtime colleague of the officer. *Id.* The detective drafted an affidavit in support of a warrant, and identified financial records showing the plaintiff had made the purchases. *Id.* at 1016-17. The Court determined that the warrant was based upon probable cause. *Id.* at 1015.

Similarly to the matter here, *Cameron* involved a purchase made with a credit card. The transaction was confirmed by the card's financial institution. There was knowledge that the transaction was used for a fraudulent purpose. The plaintiff in *Cameron* alleged that the warrant was unconstitutional because the warrant did not include information about her relationship with the officer. The Court ruled the information did not negate probable cause. Here, Mr. Spencer alleges that Det. Lebsock intentionally failed to disclose that defendants in the underlying suit – the Pences – were former SPD officers. While Mr. Spencer claims that Det. Lebsock's investigation was due to his relationship with Mr. and Mrs. Pence, he offers no proof establishing such. It is claimed simply that because Det. Lebsock previously worked with the Pences, his investigation was swayed. Det. Lebsock had no social

relationship with the Pences and their prior work history had did not impact his investigation. (ER 192-93). The trial court correctly concluded that if Det. Lebsock included information about the Pences, it would not have changed the fact that Mr. Spencer faxed a fraudulent document. (ER 14-15).

Det. Lebsock has explained his alleged errors and omissions. (SER 44-46). These explanations and the accompanying materials related to Mr. Spencer's arrest warrant establish the absence of any deliberate falsehood or reckless disregard for the truth. *Id.* The trial court correctly determined that these errors and omissions were not material to the finding of probable cause. (ER 14-15). Yet again, Mr. Spencer has not established how or which of these errors led to an "unlawful and unconstitutional" search or arrest. (ER 14, 35). Accordingly, Mr. Spencer's judicial deception claim fails.

D. Further Discovery Would Not Lead To Additional Evidence Disputing That Warrants Related To Mr. Spencer's Arrest Were Supported By Probable Cause.

Mr. Spencer alleges that he was denied the opportunity to conduct meaningful discovery, and that the trial court's denial of said discovery while dismissing all of his claims constitutes as an abuse of discretion. *Opening brief*, p. 49-50. He correctly points out that the City and Det. Lebsock filed their dispositive motion on August 12, 2019. *Opening brief*, p. 50. He is also correct that no discovery was provided to him prior to filing his opposition to the dispositive motion. *Id.* However, he is

incorrect in his argument that discovery was not provided prior to resolution of the City's and Det. Lebsock's summary judgment motion. (ER 34).

Mr. Spencer argues that the trial court erred in not giving him time to conduct discovery into the following: (1) Det. Lebsock's and others' state of mind in order to identify a potential "discriminatory intent;" (2) all records and information referenced by the City and Det. Lebsock in support of their motion for summary judgment; (3) audio recordings of witness interviews conducted by Det. Lebsock and City; (4) the opportunity to depose STCU employee Rebecca Berger; (5) discovery into the relationship between Det. Lebsock and Joseph and Marie Pence; (6) and communications between Det. Lebsock and Casey Evans. According to Mr. Spencer, this discovery is necessary to ascertain Det. Lebsock's intent as it relates to his investigation into fraudulent order.

Any motion for a continuance based on a lack of discovery is insufficient if the moving party fails to identity facts likely to be discovered that would support their claims. *Margolis v. Ryan,* 140 F.3d 850, 854 (9th Cir. 1998). Mr. Spencer fails to identify how further discovery would negate the existence of probable cause. This is important because the existence of probable cause makes Det. Lebsock's "state of mind" irrelevant.

Arrests and seizures supported by probable cause are deemed reasonable regardless of any subjective intent of the involved officers and officials. *Perez Cruz*

v. Barr, 926 F.3d 1128, 1138–39 (9th Cir. 2019) (citations omitted). *Barr* holds that the subjective intent of an involved officer has no role in determining probable cause under Fourth Amendment analysis of the facts. *Id.* As such, the trial court's finding of probable cause makes additional discovery unnecessary.

Arguing that he should have been allowed discovery, Mr. Spencer cites to *Garrett v. City & Cty. of San Francisco*, 818 F.2d 1515 (9th Cir. 1987). Mr. Spencer's reliance on *Garrett* is misplaced. In *Garrett*, the plaintiff was a discharged firefighter who had been accused of stealing items while performing his job. *Garrett v. City & Cty. of San Francisco*, 818 F.2d 1515, 1517 (9th Cir. 1987). The plaintiff filed a Title VII lawsuit in federal court, and sought, through discovery, the personnel files of 16 firefighters from the same department. *Id.* The defendants objected to the request, claiming that the personnel files contained confidential and privileged information and were not relevant. *Id.* The defendants eventually brought a motion for summary judgment. The plaintiff brought a motion to compel production of the personnel files, with both motions set to be heard on the same day. *Id.* The court heard the motion to dismiss first, and found in favor of the defendants, based in part upon the overwhelming evidence of the plaintiff's guilt and the lack of evidence regarding disparate treatment. The court then stated the pending discovery motion was moot and did not consider it on its merits. *Id.* at 1518.

On appeal, the plaintiff argued that his motion was erroneously ignored by the trial court, and that he was entitled to have the motion addressed before the summary judgment motion was resolved. This Court agreed, finding that the plaintiff's motion to compel clearly stated the information sought, did not seek additional or broad discovery, and sought information relative to the determination that similarly situated firefighters were being treated differently on the basis of race. *Garrett* at 1518-19.

The facts in *Garrett* significantly differ from the present matter. Mr. Spencer's claim's focus on an alleged racial animus that he argues affected the investigation, which as set forth above is irrelevant given the finding of probable cause. In addition, and contrary to his arguments, Det. Lebsock and the City of Spokane provided over 5,500 pages of responsive documents in response to his discovery. This included materials that clearly documented Det. Lebsock's thought process and investigation. This is in addition to Det. Lebsock's declaration and accompanying documents filed with his summary judgment motion. His declaration describes in detail his investigatory process across 46 pages. Despite being armed with this extensive material, Mr. Spencer failed to identify any evidence negating the existence of probable cause or establishing judicial deception.

While Mr. Spencer complains about the timing of his receipt of those records, it is important to note the following. Mr. Spencer received discovery responses on

September 19, 2019 and September 27, 2019. The hearing on the summary judgment motion occurred on October 1, 2019).[1] At no point between his receipt of the discovery materials and October 1, 2019 did Mr. Spencer move to supplement the record. Further, the Court's summary judgment order was not issued until November 18, 2019. In the nearly two months Mr. Spencer had between his receipt of the discovery responses and the issuance of the summary judgment order, Mr. Spencer made no efforts to supplement the record with a single document produced by the City and Det. Lebsock. Similarly, after the issuance of the November 18, 2019 summary judgment order, Mr. Spencer did not pursue a motion for reconsideration based upon any of the discovery produced by the City and Det. Lebsock. The significance of that is self-evident – there is no evidence that defeats the finding of probable cause and no evidence that Det. Lebsock engaged in judicial deception.

The claims offered by the plaintiff in *Garrett* focused on disparate treatment of similarly situated employees. As such, personnel records of similarly situated employees are relevant. In this matter, Det. Lebsock's investigation of Mr. Spencer and the probable cause developed in that investigation are at issue. Mr. Spencer was provided the documents related to Det. Lebsock's investigation. The reasoning for the investigation is clearly laid out in these materials. The facts developed through

[1] The summary judgment order [ECF 48] identifies a hearing date of September 13, 2019. This is incorrect, as the original hearing date of September 13, 2019 was continued to October 1, 2019.

the investigation are clearly laid out in these materials. The same established the existence of probable cause.

The trial court correctly noted in its ruling that Mr. Spencer's factual allegations "pertain "only to the arrest warrant, dated January 5, 2018." (*See* ECF 0048, 10, Footnote 1/ER 11). The court also noted that Mr. Spencer's briefing and oral arguments only addressed the arrest warrant. *Id.* As such, the trial court only focused its analysis on the January 5, 2020 arrest warrant. *Id.* Since Mr. Spencer's claims addressed only the sufficiency of this arrest warrant, the materials provided by Det. Lebsock and the City through discovery gave the Mr. Spencer the materials necessary to address the probable cause argument. Further discovery into Det. Lebsock's state of mind was unnecessary.

E. The Trial Court's Analysis Of The Facts In Reaching Its Decision Was Not Too Narrow And Did Not Fail To Consider The Full Spectrum Of Facts.

Mr. Spencer ignores the extensive factual information and corroborating evidence that the trial court relied on in ruling in favor of the City and Det. Lebsock. Mr. Spencer alleges that the trial court failed to consider all material facts surrounding his arrest and investigation. He claims that there was an investigation and prosecution that continued despite the lack of any probable cause. *Opening brief*, p. 31. He alleges that the trial court acknowledged that Mr. Spencer was the subject of a continued investigation through the end of February 2018, based on the

following statement from the trial court's ruling: "Here, Mr. Spencer alleges that he was arrested, searched, and prosecuted without probable cause, which led to severe emotional distress." (ER 31). This a very loose interpretation of what the trial court acknowledged, as the statement specifically says that the trial court recognized that Mr. Spencer *believes* he was arrested, searched, and prosecuted without probable cause. Further, there is no date provided in the aforementioned statement by the trial court.

Mr. Spencer alleges that the Det. Lebsock and the SPD did not discontinue investigating and prosecuting Mr. Spencer for at least another month and a half following his release from Missoula County Jail. *Opening brief*, p. 32. This is not true. Following Mr. Spencer's release from Missoula County Jail, all charges against him were dropped. He was never subjected to another arrest or additional charges. The trial court, in analyzing Mr. Spencer's equal protection claim, noted that Mr. Spencer failed to provide any evidence to support the first prong of his claim, that he was subjected to disparate impact. The following statement from the trial court's decision appropriately recognizes that Mr. Spencer suffered no damages or unconstitutional treatment following his arrest. "In fact, the undisputed facts reveal that Defendants investigated and prosecuted both Mr. Spencer and Mr. Kandratowicz, and that eventually charges against Mr. Spencer were dismissed." (ER 18).

Det. Lebsock did obtain search warrants for records that were related to the Spencers. The basis for this search in relation to the forgery of the purported order is clearly laid out in Det. Lebsock's investigative materials. (ER 193-94, 199-200, 202; SER 39-44). It should also be noted that after Mr. Spencer's release on January 16, 2018, Det. Lebsock attempted to work with the Spencers to obtain information related to the forgery that could implicate Mr. Kandratowicz's guilt and their innocence. (ER 187-88). This was never reciprocated by the Spencers, as they never provided any additional evidence related to Mr. Kandratowicz committing the forgery, never agreed to make a statement or interview with the SPD related to the forgery, and never filed a complaint for criminal charges against Mr. Kandratowicz. *Id.* Additionally, in the police report regarding the Spencers' identity theft complaint to the SPD from October 23, 2017, it states that an unknown individual contacted their bank (STCU), impersonated them, and stole $549.83 from their account. (ER 205-06; SER 62-64). Review of the financial records show that the theft never occurred. (ER 202). Det. Lebsock found no phone records evidencing the alleged fraudulent call to STCU. (SER 25-26). These facts, which are clearly articulated in the records, show that Det. Lebsock's investigation, which led to no additional charges, personal searches, or seizures was reasonable.

Mr. Spencer cites to *United States v. Lopez* 482 F.3d 1067 (9th Cir. 2007) as support that in some instances there may initially be probable cause justifying an

arrest, but additional information obtained at the scene may indicate that there is less than a fair probability that the defendant has committed or is committing a crime. "In such cases, execution of the arrest or continuation of the arrest is illegal. As we explained in *United States v. Ortiz-Hernandez*…" *United States v. Lopez*, 482 F.3d at 1073 (citing *United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005)). The holding in *Ortiz-Hernandez* states as follows:

> A person may not be arrested, or must be released from arrest, if previously established probable cause has dissipated. "As a corollary ... of the rule that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause." *Bigford v. Taylor,* 834 F.2d 1213, 1218 (5th Cir.1988); *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir.1986) ("The continuation of even a lawful arrest violates the Fourth Amendment when the police discover additional facts dissipating their earlier probable cause.").

United States v. Ortiz–Hernandez, 427 F.3d at, 574.

Contrary to what Mr. Spencer claims, *Lopez* and *Ortiz-Hernandez* do not support his argument. In this matter, Mr. Spencer was arrested pursuant to a valid search warrant based upon probable cause. Upon receipt of information showing that Mr. Kandratowicz was involved in the forgery, Det. Lebsock advocated for, and received, Mr. Spencer's release from jail. Mr. Spencer was never arrested, charged or searched following his release from jail. Accordingly, there is no instance of him being arrested or a continued arrest that is present in *Lopez* or *Ortiz-Hernandez*.

Further, as evidenced in his investigatory material, Det. Lebsock's subsequent investigation into whether Mr. Spencer had involvement in the forgery was reasonable.

Mr. Spencer contends he has established that his investigation and arrest were "induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith," and included his alleged unconstitutional prosecution that continued into February 2018. *Opening brief*, p. 33 (citing *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004). The mistakes and errors made by Det. Lebsock in his accompanying investigative materials were not material to the investigation, and have reasonable explanations that do not affect the finding of probable cause. Further, even if Mr. Spencer was subjected to continue prosecution or investigation, it never amounted to arrests or charges. Throughout his investigation, Det. Lebsock never ruled out Mr. Kandratowicz as a suspect. The day after Mr. Spencer's arrest, Det. Lebsock attempted to contact Mr. Kandratowicz. (SER 16). After he was unable to reach Mr. Kandratowicz following multiple visits to his home, Det. Lebsock contacted Mr. Kandratowicz's father and went to the workplace of his wife. (ER190; SER 16). Det. Lebsock's investigation was the basis for Mr. Kandratowicz's eventual guilty plea and the dismissal of claims against the Spencers.

Considering that he was never again charged or arrested, Mr. Spencer cannot establish any injury relating to the subsequent investigation. The investigatory materials related to Mr. Spencer's arrest warrant support the fact that Det. Lebsock's alleged continued investigation of Mr. Spencer was reasonable. Accordingly, Mr. Spencer's claims regarding an alleged continued investigation should be dismissed.

F. Appellees City Of Spokane And Det. Lebsock Did Not Violate Mr. Spencer's Rights To Due Process And Equal Protection Under The Fourteenth Amendment.

The United States Constitution provides that the government will not deprive an individual of life, liberty, or property, without due process of law. *DuValt v. Taggart*, 203 F. App'x 867, 868 (9th Cir. 2006) (citing to *Zinermon v. Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)). The due process clause of the Fourteenth Amendment confers both procedural and substantive protections. *Albright v. Oliver*, 510 U.S. 266, 272, 114 S. Ct. 807, 812, 127 L. Ed. 2d 114 (1994) (citing to *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 1010, 95 L.Ed. 2d 697 (1987); and *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 664, 88 L.Ed. 2d 662 (1986)). Procedural due process requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). "To state a substantive due process claim, the plaintiff must show…that a state actor deprived it of a constitutionally

protected life, liberty or property interest." *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008).

For arrests made pursuant to a valid warrant, officers will be protected even if the detained individual is determined innocent. *See Henry*, 361 U.S. at 102. A deprivation of liberty for a period of days is valid if based on a warrant supported by probable cause. *Id.* at 144. However, incarceration based on a mistake "after a lapse of a certain amount of time" can provide the basis for a claim under the Fourteenth Amendment. *Lee v. City of Los Angeles*, 250 F.3d 668, 683 (9th Cir. 2001) (*quoting Baker v. McCollan*, 443 U.S. 137, 145 (1979)).

Baker analyzed whether a plaintiff arrested through a valid arrest warrant and held in jail for three days suffered a violation to their constitutional rights. Before he was incarcerated, the plaintiff's brother was arrested in a nearby county. *Baker v. McCollan*, 443 U.S. at 137. The brother claimed to be the plaintiff, was released on bond and skipped bail. *Id.* Subsequently, the plaintiff was stopped for running a red light. *Id.* at 141. A warrant check revealed that the plaintiff, due to his brother's misconduct, was wanted by authorities. *Id.* The plaintiff remained in jail until authorities recognized the error and released him. *Id.* The United States Supreme Court held that no constitutional violation occurred and that "false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Id.* at 146.

Previous decisions by the Ninth Circuit show the difference between Mr. Spencer's claims and matters where erroneously detained plaintiffs have prevailed. In *Fairley v. Luman,* 281 F.3d 913 (9th Cir. 2002), the Court held that the plaintiff suffered deprivations of his Fourteenth Amendment rights after being detained for 12 days pursuant to a valid warrant. The plaintiff informed the arresting officers that the warrant was for his twin brother. *Id.* at 915. The plaintiff stated his innocence and the defendant officer(s) failed to verify the warrant and plaintiff's identity. *Id.* As such, the plaintiff was deprived of due process. *Id.* at 918.

In *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001), the plaintiff's son was arrested, mistakenly identified for a fugitive, and held in detention for two years. This Court held that the plaintiff's son suffered a violation of due process rights under the Fourteenth Amendment. *Id.* at 685.

The facts of this matter are clearly distinguishable from those present in *Lee* and *Fairley*. Mr. Spencer was arrested pursuant to a valid warrant based upon probable cause. Det. Lebsock's determination that Mr. Spencer, rather than Mr. Kandratowicz, was more likely to have forged the purported order was reasonable and based on evidence. Such evidence included that Mr. Spencer faxed the purported order to his employer. Within hours of being provided evidence of Mr. Kandratowicz's apparent wrongdoing, Det. Lebsock was able to get Mr. Spencer released from the Missoula County Jail. Mr. Spencer's detention fails to arise to the

deprivation in *Lee* and *Fairley*. As explained by the United States Supreme Court in *Baker*, "[t]he Constitution does not guarantee that only the guilty will be arrested." *Baker*, 443 U.S. at 145. "Due process does not require that every conceivable step be taken…to eliminate the possibility of convicting an innocent person." *Patterson v. New York*, 432 U.S. 197, 208 (1977). Detention based on a valid warrant without a mistaken identity fails to amount to a due process violation. All of the Mr. Spencer's claims alleging a Due Process deprivation should be dismissed.

Mr. Spencer relies on *Spencer v. Peters*, 857 F.3d 789 (9th Cir. 2017), which provides that "the existence of probable cause does not resolve [a] Plaintiff's Fourteenth Amendment claim for deliberate fabrication of evidence." *Spencer v. Peters*, 857 F.3d at 802. *Spencer* held that in order to successfully argue a § 1983 claim of deliberate fabrication, a plaintiff needs to establish: (1) the defendant deliberately fabricated evidence; and (2) the fabrication caused plaintiff to suffer a deprivation of their liberty rights. *Id.* at 798 (citing to *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1111 (9th Cir. 2010)). To establish the causation element, a plaintiff "must show that (a) the act was the cause in fact of the deprivation of liberty, meaning that the injury would not have occurred in the absence of the conduct; and (b) the act was the "proximate cause" or "legal cause" of the injury, meaning that the injury is of a type that a reasonable person would see

as a likely result of the conduct in question." *Id.* (citing to *Whitlock v. Brueggemann*, 682 F.3d 567, 582–83 (7th Cir. 2012).

Spencer is clearly distinguishable. In *Spencer*, the plaintiff served over two decades in prison for statutory rape of a minor. It was later determined that a detective involved in the investigation purposely and deliberated mischaracterized witness statements contained in her investigative reports that related to the investigation. These mischaracterizations included investigative reports containing quotations attributed to the plaintiff's alleged victims. *Spencer v. Peters*, 857 F.3d at 798. These victims testified at trial that they never made these statements. *Id*. This included a report where the investigator attributed a description of the alleged sexual abuse to one of the alleged victims. The alleged victim testified at trial that she did not make those statements, and had specifically told the investigator that no abuse had occurred. *Id.*

Spencer specifically noted that "not all inaccuracies in an investigative report give rise to a constitutional claim." *Spencer*, 857 F.3d at 798 (citing *Black v. Montgomery County*, 835 F.3d 358, 372 (3rd Cir. 2016). *Spencer* also held that "[m]ere "careless[ness]" is insufficient…as are mistakes of "tone," *Id.* at 798 (quoting *Gausvik v. Perez*, 345 F.3d 813, 817 (9th Cir. 2003); and *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d at 1113)). *Spencer* also reiterated that an error concerning "trivial matters" does not suffice to establish the element of causation

from a § 1983 claim. *Id.* (citing to *Black v. Montgomery County*, 835 F.3d at 372). Further, fabricated evidence will not support such a § 1983 claim if a plaintiff cannot show that the actual fabrication injured them in any way. *Id.* (citing to *Whitlock v. Brueggemann*, 682 F.3d at 585).

This Court in *Spencer* determined that the mischaracterizations and misquotes by the detective were not trivial and or careless, but were deliberately falsified and affected the investigation. *Spencer* at 798–99. Further, the plaintiff testified that he entered an *Alford* plea based on the fabricated evidence. *Id.* at 799.

Here, there were no deliberate falsifications. Det. Lebsock has provided explanations for his errors made during his investigation. Further, Det. Lebsock's investigation following Mr. Spencer's arrest and release did not cause any damage to Mr. Spencer. To summarize, Mr. Spencer was not charged, arrested, searched or detained following his release from Missoula County Jail on January 16, 2020.

To succeed on either a selective prosecution or selective enforcement claim, a plaintiff must show that the contested action had a discriminatory effect and was motivated by a discriminatory purpose. *United States v. Mumphrey*, 193 F.Supp.3d 1040, 1046 (N.D. Cal. 2016); *see also, United States v. Barlow*, 310 F.3d 1007, 1009 (7th Cir. 2002) (quoting *United States v. Armstrong*, 517 U.S. 456, 465 (1996)) ("In order to state a constitutional violation, a selective prosecution claim must meet the 'ordinary equal protection standards' established by the Supreme Court's

jurisprudence on racial discrimination."). To show a discriminatory effect, the plaintiff "must show that similarly situated individuals . . . were not prosecuted." *Rosenbaum v. City & Cnty. of San Francisco*, 484 F.3d 1142, 1153 (9th Cir. 2007) (quoting *United States v. Armstrong*, 517 U.S at 465).

Mr. Spencer alleges that the trial court "misplaced its reliance" on *Armstrong*. The trial court noted the decision in *Armstrong* twice in its order, with both instances constituting a secondary citation. The excerpt referred to by Mr. Spencer from the trial court's Order states as follows:

> "To succeed on either a selective prosecution or selective enforcement claim, the plaintiff must show that the contested action had a discriminatory effect and was motivated by a discriminatory purpose. *United States v. Mumphrey*, 193 F.Supp.3d 1040, 1046 (N.D. Cal. 2016); *see also*, *United States v. Barlow*, 310 F.3d 1007, 1009 (7th Cir. 2002) (quoting *Armstrong*, 517 U.S. 456, 465 (1996)) ("In order to state a constitutional violation, a selective prosecution claim must meet the 'ordinary equal protection standards' established by the Supreme Court's jurisprudence on racial discrimination.")
> …
>
> To show a discriminatory effect, the plaintiff "must show that similarly situated individuals . . . were not prosecuted." *Rosenbaum*, 484 F.3d at 1153 (quoting *Armstrong*, 517 U.S. at 465). Page 17 of order.

(ER 17-18).

Mr. Spencer alleges that *Armstrong* is distinguishable and not controlling in the outcome. He further claims that the standard (which he does not identify) does "not apply to selective enforcement claims, pursuant to *United States v. Sellers*, 906 F.3d, 848, 855 (9th Cir. 2018). Mr. Spencer is mistaken.

Armstrong held that in a claim of selective prosecution, the accused must show both discriminatory effect and discriminatory purpose. *United States v. Armstrong*, 517 U.S. at 465. The court further held that the accused must adhere to a rigorous standard, which requires the accused to establish that the government actors did not prosecute others similarly situated tot eh accused as evidence of discriminatory effect. *Id.* at 469.

Sellers distinguished itself from the *Armstrong* standard. In *Sellers*, the accused alleged that a police operation known as the "stash house reverse-sting," unfairly targeted and resulted in the arrest of black or Hispanic individuals as opposed to non-minorities. *United States v. Sellers*, 906 F.3d at 851. This Court determined in *Sellers* that there is a difference between selective enforcement and selective prosecution, and that *Armstrong* dealt with selective prosecution. Mr. Spencer interprets this decision from *Sellers* as that he does not have to meet the rigorous standard in *Armstrong*, which Mr. Spencer alleges the trial court applied. This argument is unpersuasive for several reasons.

First, *Sellers* provides that selective prosecution differs from selective enforcement but only within a "stash house reverse sting context." *Sellers*, 906 F.3d at 852–53. "The Third and Seventh Circuits have already come to the conclusion that *Armstrong*'s rigorous discovery standard does not apply in the context of selective enforcement claims involving stash house reverse-sting operations." *Id.* at 854. "The question we face is whether *Armstrong*'*s* standard is equally applicable to claims for selective enforcement, particularly in the stash house reverse-sting context." *Id.* at 852. In *Armstrong*, the Supreme Court concluded that requiring evidence about similarly situated defendants would not "make a selective-prosecution claim impossible to prove." That is not the case here; comparative statistics do not exist. As did the Court in *Armstrong*, we set the discovery standard accordingly and find that a lower standard is warranted under these circumstances." *Id.* at 854 "We are now the fourth circuit to address this question in the stash house reverse-sting context." *Id*. Based on this language, it is clear that this court in *Sellers* only differentiated from the standard in *Armstrong* because of the type of investigation being performed by law enforcement in that matter. A "stash house reverse-sting" is significantly different than an investigation into forgery that determines the subject transmitted a forged document, paid for the transmission, and the forged document benefitted the subject.

Further, Mr. Spencer ignores the holding from authority cited by the trial court in its ruling, *Rosenbaum v. City & Cty. of San Francisco,* 484 F.3d 1142 (9th Cir. 2007). *Rosenbaum* involved a claim alleging that city police officers unevenly enforced a municipal noise ordinance. As the trial court noted, the *Rosenbaum* court held that "[a] government entity has discretion in prosecuting its criminal laws, but enforcement is subject to constitutional constraints." *Id.* at 1153. *Rosenbaum* determined in order to succeed on a selective enforcement claim, the plaintiff must establish "that enforcement had a discriminatory effect and the police were motived by a discriminatory purpose." *Id.* at 1152. It also held that in order to establish a discriminatory purpose, a plaintiff must show that the defendant utilized or reaffirmed a particular course of action at least in part because it had an adverse effect on the identified group. *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 610 (1985).

Mr. Spencer argues that he fulfils the causation prong for these claims because Det. Lebsock and the City "continued to unconstitutionally pursue and threaten charges against Spencer even after the Forgery charge was dismissed at the end of February 2018." *Opening brief*, p. 37. This argument fails because Mr. Spencer was not charged or arrested or detained as a result of this alleged unconstitutional pursuit. Rather, through Det. Lebsock's investigation, Mr. Kandratowicz was charged, searched, and plead guilty to the charge of forgery. Mr. Spencer further claims that

Mr. Kandratowicz was not investigated or prosecuted between December 2017 and January 12, 2018. As he stated in his declaration, during that period of investigation, Det. Lebsock had not ruled out Mr. Kandratowicz as a suspect. (SER 12-14). Det. Lebsock's Declaration states as follows:

> At the time of my submission of my affidavit of Facts dated January 2, 2018, I believed that Gwen and Quanah Spencer, and Mr. Kandratowicz were all potential suspects. I clearly documented in this affidavit that the court documents regarding the Spencer's litigation against SAS Oregon indicated they were represented by Kandratowicz Law Firm, and specifically that the forged court order was stamped with the business of Kandratowicz Law, 1312 N. Monroe, Spokane WA. I believed that my focus and investigation on the Spencers was the logical place to start, in order to confirm with certainty who faxed the forged order and who would benefit from it. Based on where the first piece of evidence led me (the faxed order from Spencer to BNSF) it was my plan to first pursue Mr. Spencer then immediately pursue Mr. Kandratowicz if the evidence further implicated him.

(SER 12-13).

The investigation followed this plan described by Det. Lebsock. He focused on Mr. Spencer for clearly reasonable and articulated reasons. (SER 12-14). Once his investigation led to him obtaining the documents provided by Mr. Datsopoulous and Mr. Spencer, he centered his investigation on Mr. Kandratowicz.

As previously outlined, because Mr. Spencer's arrest was supported by probable cause, whether Det. Lebsock acted with a discriminatory effect or purpose

is irrelevant. Even if Det. Lebsock's subjective intent was relevant, Mr. Spencer cannot establish a discriminatory effect or purpose. His argument fails because a similarly situated individual, Mr. Kandratowicz, was investigated and charged with a crime. Further, Mr. Spencer cannot show that Det. Lebsock and the City used their particular course of action because of its adverse effects on Native American population. There is no evidence that has been or could be produced establishing such. Mr. Spencer provides statistics showing that minorities may be targeted or arrested more often that non minorities in Spokane County. That study, however, is for general arrests, not for instances of forgery. The Plaintiff in *Sellers* was specifically arguing that stash house reverse-stings resulted in a disproportionate arrest of people of color vs. non-minorities. Mr. Spencer has provided no evidence showing that the City of Spokane is statistically more likely to target Native Americans on suspicion of forgery as compared to similarly situated individuals. Further, Det. Lebsock was unaware of Mr. Spencer's status as a Native American until after his arrest. (ER 186-87).

As established, Mr. Spencer cannot establish an injury to his constitutional rights, both prior to and after his arrest and release from Missoula County Jail. Mr. Spencer was not treated differently than the similarly situated suspect within his investigation, and cannot establish he was investigated and arrested based on his status as a Native American.

G. The Trial Court Did Not Err By Dismissing All Claims Under 42 U.S.C § 1983 Against The City Of Spokane.

Mr. Spencer's § 1983 claim against the City of Spokane are governed by *Monel v. Department of Social Servs.*, 436 U.S. 658 (1978). *Monel* established that a municipality will not be held liable on a theory of respondent superior. *Id.* "[R]ecovery from a municipality is limited to acts…which the municipality has officially sanctioned or ordered." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Liability will be related to a municipality only where "action pursuant to official municipal policy of some nature caused a constitutional tort." *Monel*, 436 U.S. at 691.

Mr. Spencer's 1983 claim fails immediately, as it has been established he did not suffer a constitutional injury. Even if it was established that Mr. Spencer suffered a constitutional injury, the City of Spokane would still be immune, as there is no formally adopted policy or practice that sanctions investigation based on status as a Native American. Further, Mr. Spencer has presented no evidence of "widespread" or "permanent" practices subjecting Native Americans to excessive investigation or prosecution. There is no evidence that the City of Spokane or the SPD ordered Det. Lebsock to investigate Mr. Spencer because he is Native American. Accordingly, the City is entitled to summary dismissal all § 1983 claims.

IV. CONCLUSION

Det. Lebsock's conduct throughout his investigation was reasonable and based upon probable cause. The alleged errors made by Det. Lebsock were not material and fail to give rise to a judicial deception claim. Det. Lebsock is entitled to qualified immunity based on the defense of probable cause. Additionally, Mr. Spencer has not presented any evidence giving rise to liability for the City of Spokane as to any § 1983 claims pursuant to *Monel*. As such, all claims against the City of Spokane and Det. Lebsock should be dismissed with prejudice.

EVANS, CRAVEN & LACKIE, P.S.

By: s/ Michael E. McFarland, Jr.
MICHAEL E. McFARLAND, JR., #23000
Attorneys for Appellants

PROOF OF SERVICE AND CERTIFICATE OF COMPLIANCE

I hereby certify that on this 20th day of May, 2020, I electronically filed the foregoing Response Brief of Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system which will send notification to the following:

COUNSEL FOR PLAINTIFF
Ryan D. Poole
Dunn & Black, P.S.
111 North Post, Suite 300
Spokane, WA 99201
Phone: 455-5200
Email: rpoole@dunnandblack.com

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Appellees' Response Brief has 10,423 words and is in compliance with Rule 32(a)(7)(B).

EVANS, CRAVEN & LACKIE, P.S.

By: s/ Michael E. McFarland, Jr.
MICHAEL E. McFARLAND, JR., #23000

Attorneys for Appellees

STATEMENT OF RELATED CASES ON APPEAL

Pursuant to 9th Cir. R. 28-2.6, Appellees represent that they are not aware of any related cases pending in this Court.

Dated this 20th day of May, 2020

EVANS, CRAVEN & LACKIE, P.S.

By: s/ Michael E. McFarland, Jr.
MICHAEL E. McFARLAND, JR., #23000
Attorneys for Appellees